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APPENDIX A

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-2928

[Filed September 1, 2009]

ARBEN SKENDAJ,
Petitioner

v.

ATTORNEY GENERAL OF THE UNITED STATES,
Respondent

Petition for Review of an Order of the
United States Department of Justice
Board of Immigration Appeals
(Agency No. A99 589 904)
Immigration Judge: Honorable Frederic G. Leeds

Submitted Pursuant to Third Circuit LAR 34.1(a)
August 26, 2009

Before: RENDELL, GREENBERG and
VAN ANTWERPEN, Circuit Judges

(Filed September 01, 2009)

OPINION OF THE COURT

PER CURIAM

Arben Skendaj, a native and citizen of Albania, petitions for review of an order of the Board of Immigration Appeals ("BIA") dismissing his appeal and affirming the Immigration Judge's ("IJ") denial of his applications for relief. We will deny the petition.

Skendaj entered the United States in February 2005, joining his wife and son, who were already in this country pursuing asylum, withholding of removal, and relief under the Convention Against Torture ("CAT"). Skendaj's wife claimed that she was persecuted on account of the political opinion of her father, a high-ranking member of the Albanian Democratic Party. Following a hearing in June 2005, at which Skendaj testified on behalf of his wife and son, the IJ denied their applications for relief. The BIA affirmed the IJ's decision, and we denied their petition for review. See Skendaj v. Att'y Gen., No. 06-5029, 2008 WL 1801164, at *2 (3d Cir. Apr. 22, 2008) (non precedential).

Meanwhile, in December 2005, Skendaj filed a separate application for asylum and withholding of removal. Rather than testify again, Skendaj elected to rely on the testimony he had provided at the hearing involving his wife and son, a transcript of which was made part of the record. Updated background information on Albania was the only new evidence

presented. The IJ concluded that, in the absence of any new facts, he was bound by the decision of the IJ in the case of Skendaj's wife and son. Consequently, the IJ denied Skendaj's applications for relief. The BIA dismissed Skendaj's appeal, concluding that his experiences did not rise to the level of persecution and that the record rebutted any presumption that his life or freedom would be threatened in the future.[1] Skendaj filed a timely petition for review.

We exercise jurisdiction to review the BIA's final order of removal under Immigration and Nationality Act ("INA") § 242(a) [8 U.S.C. § 1252(a)]. Because the BIA provided its own analysis, we review the decision of the BIA. See Lukwago v. Ashcroft, 329 F.3d 157, 166 (3d Cir. 2003). We use a substantial evidence standard to review factual findings, Tarrawally v. Ashcroft, 338 F.3d 180, 184 (3d Cir. 2003), including findings concerning an applicant's past persecution or "well-founded fear of future persecution," Gao v. Ashcroft, 299 F.3d 266, 272 (3d Cir. 2002). Under the substantial evidence standard, findings are upheld "unless the evidence not only supports a contrary conclusion, but compels it." Abdille v. Ashcroft, 242 F.3d 477, 484 (3d Cir. 2001). We review the BIA's legal

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[1] The BIA also rejected Skendaj's claim that he did not receive a full and fair hearing before the IJ. In particular, the BIA noted that Skendaj was represented by counsel, agreed to rest on the testimony provided at the hearing involving his wife and son, received a review that included reports regarding current country conditions, and failed to identify any prejudice. Skendaj has not challenged this determination on appeal. See In re Surrick, 338 F.3d 224, 237 (3d Cir. 2003) (recognizing that if a party fails to raise an issue in his opening brief, the issue is waived).

conclusions de novo. See Briseno-Flores v. Att'y Gen., 492 F.3d 226, 228 (3d Cir. 2007).

An applicant may demonstrate eligibility for asylum by showing either past persecution or a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. See INA § 101(a)(42)(A) [8 U.S.C. § 1101(a)(42)(A)]. Significantly, "persecution connotes extreme behavior, including threats to life, confinement, torture, and economic restrictions so severe that they constitute a threat to life or freedom." Ahmed v. Ashcroft, 341 F.3d 214, 217 (3d Cir. 2003) (quotations omitted). It "does not include all treatment that our society regards as unfair, unjust, or even unlawful or unconstitutional." Id.

As evidence of persecution, Skendaj pointed to anonymous telephone threats and an attempted kidnapping of his son. "It is established . . . that threats standing alone . . . constitute persecution in only a small category of cases, and only when the threats are so menacing as to cause significant actual 'suffering or harm.'" Li v. Att'y Gen., 400 F.3d 157, 164 (3d Cir. 2005) (internal citations and quotations omitted). Unfulfilled threats must be of a highly imminent and menacing nature in order to constitute persecution. Id. In this case, the anonymous threats were directed at Skendaj, his wife, and his mother. Fearing for their lives, Skendaj and his wife moved to Greece. There is no indication, however, that the callers ever attempted to carry out the threats. Furthermore, Skendaj specifically stated that his mother, who remained in Albania, was never harmed.

Therefore, we agree that these incidents do not rise to the level of persecution.

Substantial evidence also supports the BIA's conclusion that the attempted kidnapping did not constitute past persecution on account of a protected ground.[2] The attempted kidnapping occurred during a trip to visit Skendaj's father-in-law. While the family was riding in a taxi, two motorcyclists, wearing helmets and dark clothing, approached the car. One motorcycle went to the right of the taxi, one went to the left, and one cyclist called to the other, "grab the kid, the window's open." One cyclist put his hand by the window as if to grab Skendaj's son, but the taxi driver was able to speed away. While no doubt frightening, this incident does not constitute persecution on account of a protected ground. Neither Skendaj nor his wife were able to identify the kidnappers, the kidnappers did not make any reference to the Skendajs' political opinion, the Skendajs did not report the incident to the police, and

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[2] Skendaj complains that the BIA failed to address whether "the kinship ties created by [his] marriage constituted a particular social group." The BIA did not specifically refer to Skendaj's allegation that he was part of a particular social group consisting of his family. But the BIA did state that it "concur[red] with the [IJ's] decision finding that the alleged events do not rise to the level of persecution on account of a protected ground." The IJ, in turn, endorsed the finding – made in connection with the asylum application of Skendaj's wife and son – that "the evidence does not establish a social group comprised of the family of" Skendaj's father-in-law. Under these circumstances, we conclude that the BIA adequately considered Skendaj's social group claim and maintain that substantial evidence supports the conclusion that Skendaj was not persecuted on account of membership in a social group.

they did not experience further threats or confrontations. Therefore, we conclude that Skendaj has not shown that the record compels a finding that he suffered past persecution.

Absent a showing of past persecution, an applicant may still establish a well-founded fear of future persecution by demonstrating that his fear is "subjective and objectively reasonable." Gomez-Zuluaga v. Att'y Gen., 527 F.3d 330, 346 (3d Cir. 2008). An applicant can meet the objective prong either by showing that he would be individually singled out for persecution upon his return or that a pattern and practice of such persecution exists. See Lie v. Ashcroft, 396 F.3d 530, 536 (3d Cir. 2005). In adjudicating the case of Skendaj's wife and son, we were "not compelled to conclude that there is a pattern or practice in Albania of persecuting a protected group of which the petitioners are members." Skendaj, 275 Fed. Appx. at 130. Our decision was based in part on the 2004 United States Department of State "Profile of Asylum Claims and Country Conditions" for Albania. Id. Skendaj submitted the 2006 version of that Profile, along with the 2006 State Department Country Report on Human Rights Practices in Albania. These documents indicate that the Democratic Party took power following elections in 2005, that there were "no indications of systematic political persecution," and that "neither the Government nor the major political parties engage[d] in policies of abuse or coercion against their political opponents." Nothing in the Profile or Report compels the conclusion that Skendaj established a well-founded fear of future persecution. See Cuko v. Mukasey, 522 F.3d 32, 40 (1st Cir. 2008) (holding that reliance on country reports was sufficient to rebut presumption of well-founded fear of future

persecution based on support for Democratic Party in Albania).

Because Skendaj has not meet his burden of proof for asylum, he necessarily failed to meet the higher burden required for withholding of removal. See Lukwago, 329 F.3d at 182. Finally, substantial evidence supports the BIA's conclusion that Skendaj failed to demonstrate that it is more likely than not that he would be tortured by the Albanian government, or that the government would consent or acquiesce to his torture.

For the foregoing reasons, we will deny the petition for review.

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A99 589 904 -Newark, NJ Date: JUN 09 2008

In re: ARBEN SKENDAJ

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Marina Meyerovich, Esquire

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] - Present without being admitted or paroled

APPLICATION: Asylum; withholding of removal; Convention Against Torture

ORDER:

PER CURIAM. The respondent's appeal is dismissed. As an initial matter, we find no due process violation or prejudice. The record reveals that the respondent received a full and fair hearing on the merits of his claim. The respondent was represented by counsel and afforded the opportunity to present, examine, and object to evidence that affected his claim. To that end, the respondent informed the court that, because he and his wife's asylum claim are based on the same facts, he would rest on the testimony that he provided in support of his wife's asylum claim, which he acknowledged was previously denied by another Immigration Judge (Tr. at 7-9, 12-14).[1] In addition, the respondent's asylum claim is throughly described in his statement in support of his asylum application that is contained in the record (Exh. 2 at Attach.). The record reveals that although the Immigration Judge relied greatly an the decision of the Immigration Judge in the respondent's wife's case, he also conducted an independent review of the respondent's claim as evidenced, in part, by the Immigration Judge's assessment of the current country conditions information submitted by the respondent. Although the respondent appears to allege error, he has not articulated or identified prejudice stemming from the alleged violations. More importantly, the respondent has failed to demonstrate that the outcome of his case would have been different had the hearing been conducted in any other manner.

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[1] Neither the respondent's wife nor his son are parties to the respondent's removal proceedings.

Turning to merits of the appeal, although the respondent challenges the Immigration Judge's credibility assessment, we decline to address credibility. Even if deemed credible, we find no legal error in the Immigration Judge's conclusion that the respondent failed to sustain the burden of proof applicable to asylum and the more stringent burden applicable to withholding of removal. *See* sections 208(b), 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §1158(b), 1231(b)(3); 8 C.F.R. §§ 1208.13(b), 1208.16(b) (2008); *see also* 8 C.F.R. § 1003.1(d)(3)(ii) (stating that the Board reviews questions of law *de novo*). Nor do we find clear error in the factual findings leading up to that determination. *See* 8 C.F.R. § 1003.1(d)(3)(i) (mandating that the Board "will accept the determination of factual issues by an immigration judge . . . unless the determination is clearly erroneous"). We concur with the Immigration Judge's decision finding that the alleged events do not rise to the level of persecution on account of a protected ground. Thus, the respondent did not suffer past persecution in Albania.

However, as the Immigration Judge noted, even if the respondent established past persecution under applicable circuit law, the record contains evidence sufficient to rebut the presumption that the respondent's life or freedom would be threatened in the future. *See* 8 C.F.R. §§ 1208.13(b)(1)(i), 1208.16(b)(1)(i). As the Immigration Judge noted, the record contains evidence demonstrating a fundamental change in circumstances such that the respondent no longer has a well-founded fear of future persecution (I.J. at 8-10). *See* 8 C.F.R. §§ 1208.13(b)(1)(i)(A), 1208.16(b)(1)(i)(A). The record reveals that the political landscape has significantly changed since the

respondent's departure (Exh. 7 (Bureau of Democracy, Human Rights and Labor, U.S. Dep't of State, *Albania - Profile of Asylum Claims and Country Conditions* (March 2006)), Exh. 8 (Bureau of Democracy, Human Rights and Labor, U.S. Dep't of State, *Albania Country Reports on Human Rights and Practices - 2005* (Mar. 2006)). Significantly, as the Immigration Judge noted, the political party that allegedly targeted the respondent and his family on account of his father-in-law's democratic activism is no longer in power. Indeed, the leader of the Democratic Party replaced the outgoing Socialist Prime Minister. Therefore, on this record, and on the facts as found by the Immigration Judge, we affirm the Immigration Judge's decision denying the respondent's application for asylum and withholding of removal.

Finally, inasmuch as the respondent does not advance a Convention Against Torture claim that is independent of his reasons for fearing persecution it follows that he has also failed to sustain the burden applicable to protection under the Convention Against Torture. Accordingly, the respondent's appeal is dismissed.

/s/

FOR THE BOARD

APPENDIX C

U. S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
IMMIGRATION COURT

Newark, New Jersey

File A 99 589 904 Date: September 29, 2006

In the Matter of)
)
ARBEN SKENDAJ)
)
Respondent)
)

IN REMOVAL PROCEEDINGS

CHARGE: Section 212(a)(6)(A)(i) of the Immigration and Nationality Act.

APPLICATIONS: Political Asylum; Withholding of Removal; Relief under Convention Against Torture.

APPEARANCES :

ON BEHALF OF RESPONDENT:

James A. Lombardi, Esquire
305 Broadway, Suite 700

New York, New York, 10007

ON BEHALF OF THE DEPARTMENT
OF HOMELAND SECURITY:

Samora Davis Gums, Assistant
Chief Counsel
970 Broad Street
Newark, New Jersey 07102

ORAL DECISION OF
THE IMMIGRATION JUDGE

REMOVABILITY/FORMS OF
DISCRETIONARY RELIEF

Respondent is a native and citizen of Albania. DHS has brought these Removal Proceedings against the Respondent pursuant to the authority contained under the Act. Proceedings were commenced with the filing of the Notice of Appear with the Immigration Court. See Exhibit 1.

Respondent, through Counsel in open Court, admitted all allegations and conceded Removability set out in the Notice to Appear. Respondent declined to designate country in the event removal became necessary and DHS recommended Albania, which the Court accepted.

On the basis of the Respondent's admissions, I find that the Respondent's Removability has been established by evidence, which is clear, unequivocal, and convincing. Furthermore, since the Respondent conceded, Removability is not an issue in this case.

This Court has reviewed the following materials: Exhibit #1 is the Notice to Appear. Exhibit #2 is the Asylum application. Exhibit #3 is the detailed statement by Respondent provided along with the Asylum application. Exhibit #4 is an August 31, 2006 submission. Exhibit #5 is an August 6 submission. Exhibit #6 is the transcript from the underlying case concerning the Respondent's wife and son that occurred in July of 2005 before Judge Annie S. Garcy here in Newark, New Jersey. Exhibit #7 is the most recent profile of Albania produced by the Department of State. Exhibit #8 is the Order of Judge Garcy denying the Respondent's wife's claim. Exhibit #9 is the Order denying Respondent's son's claim. Exhibit #10 is the Oral Decision of Judge Garcy.

The Court agreed with counsel that there was not going to be, and the Government had no problem with this approach, that it was not a need for testimony here today in light of the fact that all the parties had previously testified in the underlying case, including the Respondent. I specifically want to make clear for the record the two A numbers so there's no ambiguity for the Board and if necessary the Third Circuit for the procedural history of this case. Exhibit #8 is Judge Garcy's Order of July 1, 2005 in Nerida Skendaj, A number 98 642 500 and Exhibit #9 is the son's case and his name is Rafaelo, last name Skendaj, File number A 98 642 501, again a July 1, 2005 Decision.

Again, since Judge Garcy had already made a ruling on this case, and since all the testimony had previously occurred, and from discussions with both Counsel, the Court is of the agreement that I am going to render a Decision which will essentially summarize Judge Garcy's Decision, because this Court believes it's

bound by that Decision since there's no new factual evidence for this Court to consider. Counsel has supplemented the record in this case with obviously more updated country information, which is made a part of the record, as well as the Court has supplemented the record with a more recent U.S. State Department report dealing with Albania. The Court will reference the most recent country report dealing with Albania, so that the Court believes that the record is complete.

This Court believes that the case of the Respondent's wife and son will be outcome determinative for the husband on the legal issues as again they sit in the same shoes of the events that allegedly brought them here to the United States are all identical.

JUDICIAL LEGAL DECISION

This Court again believes it's bound by Judge Garcy's Decision under the law of the case as there's nothing different before it here today. Judge Garcy made a number of factual findings and legal findings after doing an extensive hearing. I'm going to summarize the sections related to her legal analysis by incorporating Exhibit #10 in its entirety, which is Judge Garcy's Oral Decision of July 1, 2005. Among the many reasons Judge Garcy offered for her Decision, and I'm going to read from the sections of it so there will be no ambiguity here in case there is any, for which Judge Garcy's reasoning was, she found there's a problem with on account of a nexus. She thought there was a problem with the Respondent returning back to her home country. She pointed out that one of the sisters went to school in Albania, didn't

have problems there and she also relied on the case of Meza-Manay v. Immigration and Naturalization Service to support some of her reasoning and that case is located at 139 F.3d 759 (9th Circuit (1998).

I'm going to specifically quote from some sections of Judge Garcy's Decision, so the record is clear. Judge Garcy states "There are a number of legal problems in this case leaving aside the issue of credibility. First of all, the Court can only ask who was the persecutor? There's no evidence it was the Government. The Respondent had testified, as has her husband, that they saw no uniforms on the people on the cycles, although they were dressed in dark clothing." Judge Garcy references the British Home Office report, Section 3.6.6 that it is "unlikely" that the Government of Albania or its police would be persecutors of individuals simply because they're members of the Democratic Party. In other words, neither the specific testimony in the Court, according to Judge Garcy, nor the general evidence about country conditions in Albania would convince Judge Garcy that there is any possibility other than total speculation that the people on the motorcycles were members of the Government. On page 11 of Judge Garcy's Decision she indicates that there is, of course, the possibility that this was an attempt at an abduction for criminal purposes. To be frank, "that's far more plausible than the possibility that this was a politically charged kidnapped." And that's really going to the issue on account of a nexus, which seems to be a large part of her Decision.

Judge Garcy points out that the alleged kidnappers abandoned their effort to grab the child almost immediately and never made any subsequent threats by phone or even, for that matter, came by the house

again or staked it out. It was Judge Garcy's opinion that quite enough evidence that this had nothing to do with who the Respondent might be as an individual. As far as Judge Garcy was concerned, persons who were bent on kidnapping someone in order to make a political statement would try much harder and she believed that was not the case. Judge Garcy again indicates there's no linkage to the Government with regard to the identification of the alleged persecutors and that Judge Garcy believes the Respondent failed to prove a countrywide fear of persecution throughout Albania. She indicated, in other words, that the Respondents were unable to prove an inability for them to internally relocate and this should be reasonably expected in this case. Judge Garcy points out that Respondent's sister was schooled in Tirana and never had any problems at her private school education, certainly never took the stand in the underlying case, nor was she offered here today in this case before this Court. Judge Garcy points out that the Respondent's mother-in-law was never offered into any evidence of ever being threatened as well.

Judge Garcy next points out on page 15 of her Decision with regard to what else this case might be about, the Respondent seems to claim that she believes that there must be a social group comprised of relatives of her father. Relatives of her father, however, were only granted asylum as derivatives of the Respondent's mother's I-589. And Judge Garcy then points out the I-589 was not even provided to her so the Court was not sure exactly what the claim might have been about. But Judge Garcy indicates obviously the Respondent's family had not made individual Application for Asylum so as to convince her that there is just some sort of social group. Instead

Judge Garcy points out probably consistent with the Decision much like Meza-Manay v. INS, supra that the wife of a member of the National Police in Peru persecuted by Sendero Luminoso. The mother of the Respondent probably, according to Judge Garcy, presented an Asylum claim explaining that she had suffered threats and harm because of her marriage to a prominent Democratic Party activist in her community. Judge Garcy states that if the Respondent's siblings were able to immigrate, and if the Respondent's father was able to immigrate, that is because Section 208 of the Act contemplates family unification and Asylum status to spouses and unmarried children. Judge Garcy then points out that the evidence does not establish a social group comprised of the family of the Respondent's father. Judge Garcy indicates there was no evidence that other members of the family were mistreated because of their relationship with the Respondent's father other than potentially the Respondent's mother as the Court had already observed. Judge Garcy pointed out the Respondent's sister was never harmed. Respondent's brother had only one altercation that was easily avoided and never repeated. The Respondent was never a member of the Democratic Party herself, never visible with her father. Judge Garcy pointed out that the father testified that he rarely even took her along with her when he would go about Democratic Party activities. Indeed, according to Judge Garcy, she is not even a part of that family, for she is essentially married into her husband's. And that was the reasoning that Judge Garcy gave in relation to an argument in relation to social group.

The Respondent claimed that she would have fear of future persecution in Albania should she return.

The Court has not found that the Respondent was persecuted in the past, and this is according to Judge Garcy, cannot find that she has a reasonable or well-founded fear of future persecution either.

Judge Garcy indicates that she wishes she could do something other than order the removal of the Respondents. She noted that the Respondents had substantial ties to this country, were certainly pleasant enough witnesses to me and appeared to be law abiding in every way, but there was no application for Voluntary Departure. She indicates if the husband were able to qualify in the future for Asylum, she might change her mind. But as we've noted today, counsel is resting on the record, there's not a new theory for this Court to consider in relation to the husband.

This Court wants to specifically reference the most recent profile of the Asylum claims and country conditions in Albania to further deal with the issue of future persecution. It indicates that in July of 2005, the National Parliament Elections in Albania's sixth general election since the fall of communism were conducted and noticeably improved environment with little of the violence or intimidation that marred previous elections. However, official election results were delayed for weeks due to allegations and some irregularities, complex complaint and appeals and procedures and the need to rerun the elections in several zones. On September 2, 2005 the President convened a new parliament and nominated Solly Berisha, the leader of the Democratic Party, to replace the outgoing socialist Prime Minister Fattos Nano.

And again I am quoting and paraphrasing from the most recent Albania profile on Asylum claims and country conditions dated March of 2006. The report indicates on page three, "Albania remains a country with a high degree of organized crime and indemit corruption. However, there's been no outbreaks of political violence since 1998 and the available evidence suggests that neither the Government nor the major political parties engage in policies of abuse or coercion against the political opponents. While serious political repression existed in the past, the report indicates there are no indications of systemic political persecution in Albania at the present time."

On page six it indicates in 2005, primary elections were conducted in relative peace with few reports of intimidation. However, election votes were not finalized for weeks due to some irregularities, which this Court had noted previously. Democratic Party and its allies took control of parliament with 81 of the 140 seats following the smooth transition and power to the new Government, which was sworn in on September 11. So this Court wants to indicate that since Judge Garcy's Decision, we now have a Democratic leadership in place in Albania and at least according to the most recent country report, they are not the kind of problems, political problems, people are experiencing the violence, if the Respondents were to return to their country. The Court is aware in Exhibit #4 of a variety of latest articles from Respondent's counsel, but they're all dated 2005, these articles, and again the more recent country report is dated March of 2006, but the Court is aware of the variety of arguments raised by Respondent's counsel and supplemental additional materials provided on Respondent's behalf.

In short, the Respondent has failed to make out a claim for past persecution and according to Judge Garcy and even if the Respondent successfully made out a claim for past persecution, has failed to make out a claim for future persecution. This Court relies on Judge Garcy's reasoning and analysis as specifically referenced in her July 1, 2005 Decision.

ORDER

Ordered that Respondent's request for Asylum is hereby denied.

IT IS FURTHER ORDERED the Respondent's request for Withholding of Removal is hereby denied.

FREDERIC G. LEEDS
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before FREDERIC G. LEEDS, in the matter of:

ARBEN SKENDAJ

A 99 589 904

Newark, New Jersey

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

/s/ _____

Kathy T. Altland, Transcriber

YORK STENOGRAPHIC SERVICES, INC.
34 North George Street
York, Pennsylvania 17401-1266
(717) 854-0077

JUN 06 2007
Completion Date

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APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 08-2928

[Filed December 1, 2009]

ARBEN SKENDAJ, Petitioner,	)
v.	)
ATTORNEY GENERAL OF THE UNITED STATES Respondent	)

Petition for Review of an Order of the
United States Department of Justice
Board of Immigration Appeals
Agency No. A799 589 904
Immigration Judge: Frederic G. Leeds

Present: RENDELL, GREENBERG, and VAN ANTWERPEN, Circuit Judges

SUR PETITION FOR PANEL REHEARING

The petition for rehearing filed by petitioner having been submitted to all judges who participated in the decision of this court, and no judge who concurred in the decision having asked for rehearing, the petition for rehearing is hereby DENIED.

BY THE COURT:

/s/ Marjorie O. Rendell

Circuit Judge

Dated: December 1, 2009
tmm/cc: Charles Christophe, Esq.
Zoe Heller, Esq.